United States Court of Appeals

for the Second Circuit

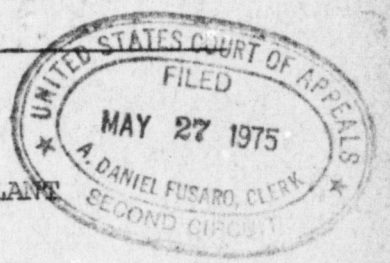
APPELLANT'S REPLY BRIEF

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

75-7028 B

P/S

FRANCIS X. CALO	:	
Plaintiff-Appellant	:	
vs.	:	On Appeal from the United States District Court for the District of Connecticut
R. MORRIS PAINE, et al	:	
Defendants-Appellees	:	



REPLY BRIEF OF PLAINTIFF-APPELLANT

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fact which the defendants admit. Thus, the plaintiff's

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ARGUMENT

I. THE ENTRY OF SUMMARY JUDGMENT

The defendants in their brief argue at length that their motion to dismiss was properly construed as a 12(b)(6) motion under Rule 12 (Appellees' Brief, pp. 6-12). The plaintiff does not dispute that proposition. The issue, however, is whether or not it was proper to enter summary judgment.

The defendants argue that matters outside the record were before the District Court; but they ignore the fact that they were placed there, by the agreement of all concerned, for the limited purpose of enabling the District Court to rule on the plaintiff's request for preliminary relief. The defendants' motion to dismiss was not even filed until after the hearing on preliminary relief had begun (Appendix, p. 94) and the written partial stipulation of facts between the plaintiff and the Civil Service defendants expressly stated that it was entered "solely for the purpose of decision on the plaintiff's Motion for Preliminary Injunction" (Appendix, p. 43). Although it had been agreed in advance that the preliminary hearing would be limited to the procedural issues, the defendants brought to the hearing omnibus affidavits which included sections on the plaintiff's First Amendment claims (Appendix, pp. 34-40 and pp. 45-64). The plaintiff consented to these documents being accepted for the record; but it was made clear that consideration of the portions of the affidavits dealing with motivation and political retaliation was to be deferred (see Appendix, p. 95

two cases do not support that proposition. In Young, the

and p. 87). Although the Court may nevertheless have been entitled to proceed to summary judgmert based on those affidavits, in the context of the purpose for which they had been entered into the record, it was unfair to the plaintiff to have done so without some warning to the plaintiff.

It is possible that, in fact, the District Court did ignore the affidavits, at least as concerns the First Amendment claim. That matter is discussed in Part IV below.

II. THE PLAINTIFF'S PROPERTY INTEREST CLAIM

A. WATERBURY CIVIL SERVICE RULES

The defendants persist here in their argument that the plaintiff is attempting to argue that he could legally have been fired only on the 180th day of his appointment (Appellee's Brief pp. 33-34). The plaintiff makes no such argument. It is clear from the Waterbury Civil Service Rules that the plaintiff could have been fired "at any time during the probationary period" (Rules, Chapter IX, Section 5). That, however, is not even a relevant fact in assessing the presence or absence of a property interest. Even if the plaintiff had been a tenured civil service employee, he could still have been fired "at any time." In such a case, he would nevertheless have had a property interest in his job, because a tenured employee can be fired only for cause. The precise nature of that cause would ordinarily be defined by contract or local law.

Viewed this way, it can be seen that the issue is not whether the plaintiff could be fired at any time. It is whether he could be fired at will. The District Court construed Chapter IX of the Civil Service Rules to authorize dismissals at will;

and the plaintiff concedes that, if this is a correct construction of Chapter IX, then the plaintiff has no property interest in his job.

This construction, however, is contradicted by Chapter IX, which does define a cause standard for dismissal, which requires a written statement of reasons (and thus implies that there must be reasons), and which conditions dismissal upon the independent concurrence of an agent of the Civil Service Commission. Even the Parking Authority defendants concede that the maximum authority they had under local law was to request permission to remove the plaintiff from his job (see Appendix, p. 53). See Appellant's Brief, pp. 20-24, for a more complete discussion of this issue. The defendants try to avoid these mandates of Chapter IX by reference to Section 1 of that Chapter entitled "Objective," which describes the probationary period as "an integral part of the examination process" to be utilized, inter alia, "for rejecting any employee whose performance is not satisfactory." That, of course, is the function of any probationary period and is not unique to the Waterbury civil service system. Characterization of probation as part of the total examination process, i.e., as part of the procedure by which permanent employees are selected, does not change the issue, which is whether a probationary employee in Waterbury has a property interest in completing his period of probation.

The issue can best be illustrated by two examples:

(1) Assume that the Civil Service Rules provided, as here, that probation was part of the total examination process but that a probationary employee could be dismissed during the term of his probation only "for good cause shown." Assume further that those Rules established no procedures by which the employee could request or receive a hearing. The plaintiff submits that, under such a set of rules, an employee, even though probationary, would have a property interest in his job and the rights associated with the due process clause would attach as a matter of federal law.

(2) Now assume the same system, except that the Rules provide for dismissal during probation not "for good cause shown" but "by the director of the employee's department at will." Under such a system, a probationary employee would clearly have no property interest in his job.

The plaintiff maintains that the Waterbury Civil Service Rules establish a system for probationary employees essentially in accord with the first of the two preceding examples.

B. COMMON LAW OF THE SYSTEM, AS REFLECTED IN MUTUAL UNDERSTANDINGS

The plaintiff has also argued that it was understood that his probationary period was for six months. This allegation was made in ¶20 of the complaint in less than the clearest form ("...in accordance with the understanding of all the parties to this action, the first six months of said appointment are served in probationary status," Appendix, p. 5). In that

form, it was stipulated to by the Civil Service defendants (Appendix, p. 43). The defendants now argue that "it is explicit, from the City's side," that there was no such understanding (Appellee's Brief, p. 15), falling back upon its undisputed claim that the Civil Service Rules authorize dismissal at any time during probation. As discussed above, the fact the plaintiff could be fired at any time does not resolve the issue of whether there were mutual understandings or a "common law" that a probationary employee would not be terminated mid-probation except for cause and does not per se preclude the possibility of such an understanding consistent with the Civil Service Rules.

The defendants also argue that such an understanding must be "explicit" (Appellee's Brief, p. 15). The plaintiff has alleged a "mutual understanding" but has admittedly not alleged a "mutually explicit understanding." The explicitness requirement comes from Perry v. Sindermann, where the Supreme Court stated that a property interest could be based upon "rules or mutually explicit understandings that support the claim of entitlement to the benefit," 408 U.S., at 601. In contrast, in Roth the Court, in providing a general description of what constituted a property interest, did not use the word "explicit":

> Property interests...are created and defined by existing rules or understandings that stem from an independent source such as state law - rules or understandings that secure certain benefits and that support claims of

entitlement to those benefits, 408 U.S., at 577.

Although it is not perfectly clear, it seems that the language in Roth is the more general definition and that the essential element of the sort of property interest described there is not its "explicitness" but its "mutuality." If properly alleged, the matter becomes one of fact for trial.

III. THE PLAINTIFF'S PROCEDURAL LIBERTY INTEREST CLAIM

The analysis of the District Court, which the defendants have endorsed, divided the plaintiff's liberty interest into an interest in reputation and an interest in future employability. That Court concluded that the same degree of stigma was necessary to harm either interest and that the plaintiff had not alleged charges sufficiently stigmatizing to state an injured interest. As to reputation, it held that involvement by the plaintiff in publicity about his dismissal was, in effect, a waiver of his claim of reputational injury. As to future employability, it ruled that the plaintiff could not rely on job rejections after dismissal to show the effect of the dismissal on future employability.

A. DEGREE OF STIGMA

The defendants argue that the plaintiff has alleged no charges against him which seriously stigmatize him. A comparison of the Appellee's Brief (pp. 21-22) with the Appellant's Brief (pp. 36-42) will indicate that it is possible to characterize the same facts in different ways. There is no

point in rehashing those cases here. The appellant submits that a fair reading of the cases cited by both sides in this appeal, Russell v. Hodges, 470 F2d 212 (2 Cir., 1972), from this Circuit, will indicate that charges of highly offensive or severe personality or character defects and of gross incompetence are stigmatizing for purposes of injury to a liberty interest. In addition, an examination of the charges actually made against the plaintiff reveals allegations that go far beyond those discussed by this Court in Russell v. Hodges.

B. PLAINTIFF'S ROLE IN THE DISSEMINATION OF THE CHARGES AGAINST HIM

If the court finds that the charges against the plaintiff were sufficiently severe at least to raise a legitimate issue of an interference with the plaintiff's reputational interest, then it is clear that publication of the charges exacerbated the injury. The defendants argue that the plaintiff's requests at the meeting of July 5, 1974, for a statement of the charges and a chance to respond waives his claim to reputational injury. But they ignore the fact that the record of that meeting was in any event public.

The defendants concede that the plaintiff had a right to a written statement of the charges against him (Appellee's Brief, p. 16 and p. 19, Appendix, p. 54, and Civil Service Rules, Ch. IX, §5(a)). They also implicitly concede that such a letter stating the charges had to be approved at a public meeting of the Parking Authority. At the very least, that

was the procedure followed by the Parking Authority defendants (see Appendix, pp. 52-55). For example, the minutes of the July 5 meeting reported:

> The Chairman explained that this was a special meeting of the Parking Authority, notice of which had been properly posted in the City Clerk's office Tuesday afternoon... (Appendix, p. 52)
>
> Mr. Paine reminded those present that this was a meeting of the Parking Authority, not a court of law, no one was on trial. He explained to Atty. Krug that the Authority had already voted to request the approval of the Director of Personnel to remove Mr. Calo from the position of Executive Director, and that the Authority was now discussing the next step which will be a written report listing the reasons for the action. (Appendix, p. 53) [Emphasis added]

The Authority then voted unanimously, on the record, to approve the particular statement of reasons, set out at pp. 17-18 of the Appendix, which the plaintiff had a right to receive (Appendix, p. 55). The statement of reasons was "attached as part of these minutes '3'." (Appendix, p. 53 and pp. 17-18.) The minutes of Parking Authority meetings are "available for public inspection at all reasonable times," pursuant to §1-21 of the Connecticut General Statutes.

It may seem peculiar that personnel matters of this sort would appear on the public record, but this result is a consequence of the fact that the employee being dismissed was himself the head of his department. An examination of Chapter IX, Section 5(a), of the Civil Services Rules indicates some doubt as to whether or not a department head can be dismissed by the procedure of that section. Section 5(a) actually

authorizes dismissal during probation at the request of "a department head..." Indeed, the plaintiff argued to the Authority that it could not legally dismiss him under §5(a) because he, as department head, had not requested the dismissal (See Appendix, p. 52 and pp. 56-57). The Authority rejected this view and defendant Paine ruled, on the authority of the legal opinion of Assistant Corporation Counsel John Phelan, that, when a department head was being dismissed during probation, the Parking Authority itself was the "department head" for purposes of §5(a) (Appendix, p. 52). Thus, whereas a subordinate employee could be dismissed under §5(a) without a meeting of the Parking Authority, the department head could be dismissed only by vote of the Authority, which necessarily required the convening of a formal meeting. The plaintiff's request for a statement of charges on the record, which the Authority was required to approve on the record in any event, should not be construed as a waiver of his right not to be deprived of liberty without due process of law.

The defendants argue that they were willing to discuss charges with the plaintiff privately (a claim which the plaintiff disputes) and that they were themselves trying to protect his reputation. This explanation, however, is ingenuous, since the Parking Authority itself by law had to approve a formal statement of reasons and had to place that statement on the record, because the plaintiff was a probationary department head, and not merely an ordinary probationary employee.

The Parking Authority defendants chose to dismiss the plaintiff for the serious reasons alleged in their letter, and not for his mere "unsuitability" for the job. They necessarily had to vote on that statement of charges on the record. They should not be permitted to escape their responsibility for those charges, if this Court finds them serious enough to be otherwise injurious to reputation.

C. IMPACT OF SUBSEQUENT EVENTS ON THE PLAINTIFF'S EMPLOYABILITY INTEREST

The defendants argue that the plaintiff has no right to show the actual impact of the charges on his ability to obtain future employment and seem to construe the plaintiff's argument to require a trial on the facts in every instance of job termination. That is not the plaintiff's argument. Where the dismissal amounts to no more than a relatively neutral refusal to retain or rehire, the defendants' view may be correct. But where the charges on their face are serious, it may be impossible to assess their impact until later. At that point, a threshold is crossed and the plaintiff is entitled to show actual impact.

The plaintiff properly laid the groundwork for that claim. His complaint alleged that, as of the date of the complaint, he was still unemployed (Complaint ¶38, Appendix, p. 9); and, as of the date of the hearing in District Court, he was still unemployed. He alleged, and the defendants conceded, that the discharge letters have been placed in his permanent personnel file (Complaint ¶54, Appendix, pp. 11-12; Appendix, p. 43),

where they will presumptively be relied upon for making recommendations in regard to future job applications by the plaintiff with both the city and with other employers. He alleged that his ability to obtain future employment in similar executive positions "has been destroyed or seriously damaged" (Complaint ¶56, Appendix, p. 12). Since that time, the plaintiff has obtained evidence which he believes indicates that the City of Waterbury is treating him as unreemployable for other jobs, in reliance upon his personnel file from his dismissal as Executive Director of the Parking Authority. The view of the District Court and the defendants makes it impossible for the plaintiff to show the continuing impact of the derogatory charges surrounding his dismissal. In addition, it makes it impossible for him to adduce evidence that he has been precluded from obtaining other similar level jobs with the City of Waterbury or to show the nature of his unsuccessful efforts to find new employment.

The impact on future employability is necessarily a question of fact. If the charges associated with dismissal reach a certain level, then the plaintiff should be allowed to show their actual effect. If this court finds that the charges reached that level, then the plaintiff should not be deprived of the opportunity at trial to show that the charges have had a serious effect on his ability to obtain other jobs.

IV. THE PLAINTIFF'S FIRST AMENDMENT CLAIM

A. APPLICABILITY OF ALOMAR

The defendants argue that Alomar v. Dwyer, 447 F2d 482 (2 Cir., 1971), is applicable to civil service employees. Such an interpretation turns Alomar on its head. A reading of that decision shows the extent to which Alomar was concerned with employees appointed outside the civil service system and exempt from it. The Alomar court, in upholding a political dismissal, concluded:

> The spoils system has been entrenched in American history for almost two hundred years. The devastating effect that such a system can wreak upon the orderly administration of government has been ameliorated to a large extent by the introduction of the various Civil Service laws. However, it is well understood that the victors will reap the harvest of those public positions still exempt from such laws. Indeed many such positions are exempt because a new administration taking office can only carry out its policies by replacing certain officeholders. If and when additional exempt positions are to be subject to civil service protection is a matter for action by the appropriate municipal and state authorities and not by a federal court, 447 F2d, at 483-84. [emphasis added]

Appointment to the Parking Authority board is a part of the political process, and the defendant Parking Authority members hold their positions exempt from Civil Service. But the City of Waterbury has chosen to place the position of Executive Director of the Parking Authority within the Civil Service system and to make the selection of the executive director dependent

on merit, not on political factors. This is an indisputable fact which the defendants admit. Thus, the plaintiff's position is not exempt from civil service and the Alomar reasoning cannot apply.

B. VIABILITY OF ALOMAR

The defendants, at pp. 25-30 of their brief, make the remarkable argument that Alomar survived Roth because the Supreme Court in Roth did not mention the Alomar case. In particular, they argue that Roth implicitly endorsed the statement in Alomar that "the Bailey court teaches that the sole protection for government employees who have been dismissed for political reasons must be found in Civil Service statutes or regulations," 447 F2d at 483 (Appellee's Brief, p. 26).

The plaintiff is at a loss to find any support in Roth or Sindermann for such a conclusion. The Roth court expressly discussed and rejected the Bailey doctrine in Footnote 9 of its opinion, 408 U.S., at 571, n. 9. And in Sindermann the Supreme Court expressly rejected the proposition quoted above from Alomar by holding that the absence of a property interest in public employment was "immaterial to his free speech claim," 408 U.S., at 598. In addition, see generally Part I of the Court opinion in Sindermann, 408 U.S., at 596-98. The law as it now stands is that the Fourteenth Amendment prohibits the government from dismissing an employee for political reasons, except to the uncertain extent that Alomar may carve out a

narrow exception for patronage employees.

C. THE QUESTION OF SUMMARY JUDGMENT

If a probationary civil service employee cannot be terminated during probation for the exercise of his First Amendment rights prior to the time he began his job, then the plaintiff is clearly entitled to a trial in the District Court to attempt to prove this retaliatory motivation. It is hard to tell what weight the District Court gave to the various affidavits, but it appears that it ultimately disregarded them and concluded that the plaintiff had failed to plead a cause of action. (See Appendix, pp. 87-88). This is apparently the defendants' interpretation of the District Court's opinion (Appellees' Brief, pp. 29-30 and p. 30, n. 7). It is also the view of the plaintiff, who has argued elsewhere (Appellant's Brief, pp. 5-8) that the District Court was simply in error if it believed that the facts relating to the plaintiff's First Amendment claim were undisputed.

The Supreme Court opinions in both Roth and Sindermann seem to be about as clear as possible that allegations of the sort made by the plaintiff entitle him to a trial. In Roth the Court did not reach the First Amendment issue because the District Court had held that it could not decide that issue without a trial to explore the motives for the decision. Without making an express ruling on the matter, the Supreme Court appeared to endorse the District Court's approach, 408 U.S., at 568, n. 5:

> The District Court came to no conclusion whatever regarding the true reason for the University President's decision. "In the present case," it stated, "it appears that a determination as to the actual bases of [the] decision must await amplification of the facts at trial.... Summary judgment is inappropriate." 310 F Supp 972, 982. [emphasis added]

What was implicit in Roth was made explicit in Sindermann, 408 U.S., at 598:

> In this case, of course, the respondent has yet to show that the decision not to renew his contract was, in fact, made in retaliation for his exercise of the constitutional right of free speech. The District Court foreclosed any opportunity to make this showing when it granted summary judgment. Hence, we cannot now hold that the Board of Regents' action was invalid.
>
> But we agree with the Court of Appeals that there is a genuine dispute as to "whether the college refused to renew the teaching contract on an impermissible basis-as a reprisal for the exercise of constitutionally protected rights." 430 F2d, at 943. The respondent has alleged that his nonretention was based on his testimony before legislative committees and his other public statements critical of the Regents' policies. And he has alleged that this public criticism was within the First and Fourteenth Amendments' protection of freedom of speech. Plainly, these allegations present a bona fide constitutional claim...
>
> For this reason we hold that the grant of summary judgment against the respondent, without full exploration of this issue, was improper. [emphasis added]

In their brief, the defendants appear to rely on Young v. Coder, 346 F. Supp. 165 (M.D. Pa., 1972), and Shakman v. Democratic Organization of Cook County, 356 F. Supp. 1241

(N.D. Ill., 1972), for the proposition that the plaintiff is not entitled to a trial upon his First Amendment claim. Those two cases do not support that proposition. In Young, the District Court deliberately chose to defer decision until after trial was held, 346 F. Supp., at 166. Shakman was, like Alomar, a case involving patronage, not civil service, employees and therefore not applicable here. The District Court there refused to dismiss part of the complaint. For the part it did dismiss, it relied on Bailey v. Richardson, 182 F2d 46 (1950), Alomar and Burns v. Elrod, 71 C 607 (N.D. Ill., 1972) and seemed to be unaware of Roth and Sindermann, which had been decided one month earlier. The validity of Shakman itself is in doubt, since Bailey has been undermined by Roth; Alomar is uncertain; and Burns has been reversed by the Seventh Circuit, Burns v. Elrod, 509 F2d 1133, 43 LW 2351 (7 Cir., 1975). In any event, Young and Shakman must inevitably yield to the mandate of Sindermann that the plaintiff is entitled to a trial.

The District Court had no basis upon which to evaluate the motives of the defendants and could not reasonably have concluded that their decisions were free from political retaliation. Although spelled out in neither the opinion of the District Court nor the brief of the defendants, perhaps the District Court felt that the plaintiff's verified complaint did not plead his claim of retaliation with enough specificity. If this were the case, the court should have dismissed with leave to amend. The entry of summary judgment precluded such amendment. In any event, the plaintiff is entitled to plead

his case in a relatively general manner, so long as he states a cause of action, and he is not required to plead his evidence. An examination of the plaintiff's complaint will show that it is, though relatively general, sufficiently specific to indicate the outlines of his case. The District Court has no right to dismiss his complaint because it does not believe he will be able to prove his complaint at trial.

CONCLUSION

For the foregoing reasons, the plaintiff prays that this Court reverse the decision of the District Court and remand this action for trial.

PLAINTIFF

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CERTIFICATION

I hereby certify that a copy of the foregoing has been sent by U.S. Mail, postage prepaid to John Phelan, Corporation Counsel, 236 Grand St., Waterbury, Conn., and Frank Healey, Healey & Healey, 66 Linden St., Waterbury, Conn.

Raphael L. Podolsky
Commissioner of the Superior Court